

FILED

MAR 7 1983

ALEXANDER L. STEVAS,  
CLERK**NO.**

**IN THE  
SUPREME COURT  
OF THE UNITED STATES  
October Term, 1982**

WASHINGTON STATE DEPARTMENT OF GAME  
Petitioner,

v.

UNITED STATES OF AMERICA  
and  
QUINAULT INDIAN NATION, et.al.,  
Respondent.

On Writ Of Certiorari To The  
United States Court of Appeals  
For the Ninth Circuit

**PETITION FOR WRIT OF CERTIORARI**

KENNETH O. EIKENBERRY  
Attorney General

JAMES M. JOHNSON  
Sr. Asst. Attorney General  
Fisheries and Game Division  
Temple of Justice PB-53  
Olympia, WA 98504  
206/753-2498

The Petitioners State of Washington  
and Washington Department of Game,  
hereinafter "Washington", respectfully  
pray that a writ of certiorari issue to  
review the judgment and opinion of the  
United States Court of Appeals for the  
Ninth Circuit entered in this proceeding  
on December 7, 1982.

QUESTIONS PRESENTED

1. Can the Quinault Tribe exclude  
non-members from fishing in navigable  
waters<sup>1</sup> within the boundaries of the  
Indian reservation where a substantial  
portion of the lands abutting the

---

<sup>1</sup> The navigable waters are portions of  
the Quinault River and Lake  
Quinault. Most is within the  
exterior boundaries of the Quinault  
Reservation. The upstream portion  
of the Quinault River is outside the  
Reservation.

navigable waters are in non-Indian ownership?

2. Are treaty Indian fisheries on fish runs arising within a reservation subject to restrictions to assure other citizens an opportunity to participate in the fisheries?

3. Does the decision of this court in Washington v. Washington Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 61 L.Ed.2d 823, 99 S.Ct. 3055 (1979), to which the Quinault Tribe was a party, constitute res judicata in determining the Quinault Tribe's maximum share of the harvestable fish run?

**LIST OF ALL PARTIES TO PROCEEDING.**

The parties actively participating in the proceeding below were: Quinault

Indian Nation; State of Washington,  
Department of Game; and the United  
States of America.<sup>2</sup>

---

2 Other parties to the proceeding in the district court as it exercises continuing jurisdiction were: Jamestown Klallam Tribe, Puyallup Tribe, Makah Tribe, Tulalip Tribe, Snoqualmie Tribe, Quileute Tribe, Hoh Tribe, Port Gamble Klallam Tribe, Jamestown Band Clallam Tribe, Lower Elwha Band Klallam Tribe, Muckleshoot Tribe, Nisqually Tribe, Nooksack Tribe, Port Gamble Band - Klallam Tribe, Suak-Suiattle Tribe, Skokomish Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Suquamish Tribe, Swinomish Tribal Community, Upper Skagit Tribe, Yakima Tribe, Lummi Tribe, Swinomish Indian Tribal Community, and the Washington State Department of Fisheries.

TABLE OF CONTENTS AND  
TABLE OF AUTHORITIES

Table of Contents

	<u>Page</u>
QUESTIONS PRESENTED . . . . .	1
LIST OF ALL PARTIES TO PROCEEDING . . . . .	2
TABLE OF CONTENTS AND TABLE OF AUTHORITIES . . . . .	4
OPINION BELOW . . . . .	10
JURISDICTION OF THIS COURT .	11
TREATIES INVOLVED . . . . .	11
STATEMENT OF THE CASE . . . . .	12
FEDERAL COURT JURISDICTION .	22
REASONS FOR GRANTING THE WRIT . . . . .	22
1. The decision below con- flicts with decisions of this Court limiting the authority of Indian tribes over non-Indians. . . . .	23

Page

2. The decision that the Tribe may catch all the reservation fish run conflicts with this Court's decisions interpreting the treaty fishing articles. . . . .	32
CONCLUSION . . . . .	40

**APPENDICES**

Opinion -

United States v.

Washington, 693 F.2d 188  
(1982) . . . . . App. A

Report and Recommendation on Motion for Temporary Restraining Order or Preliminary Injunction - United States v. Washington . . . . App. B

Order Modifying and Approving Magistrate's Proposed Findings and Conclusions Re Allocation of Quinault River Steelhead - United States v. Washington . . . . App. C

	<u>Page</u>
<u>Order - United States v. Washington . . . . .</u>	App. D

Table of Authorities

Cases

<u>Consolidated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982) cert. denied U.S. (Nov. 1, 1982)</u>	. . . . . 21, 25
<u>Douglas v. Seacoast Products, 431 U.S. 295, 52 L.Ed.2d 304, 97 S.Ct. 1740 (1977)</u>	. . . . . 27, 28
<u>Halbert v. United States, 283 U.S. 753, 75 L.Ed. 1389 (1931)</u>	. . . . . 31
<u>Montana v. United States, 450 U.S. 544, 67 L.Ed.2d 209, 101 S.Ct. 1245 (1981)</u>	. . . . . 23, 29

Page

<u>Oliphant v. Suquamish Indian Tribe</u> , 435 U.S. 191, 55 L.Ed.2d 209, 98 S.Ct. 1011 (1978) . . . . .	23
<u>Puyallup Tribe v. Department of Game (Puyallup I)</u> 391 U.S. 392, 20 L.Ed.2d 689, 88 S.Ct. 1725 (1968). . . . .	32
<u>Puyallup Tribe v. Washington Game Department (Puyallup III)</u> 433 U.S. 165, 53 L.Ed.2d 667, 97 S.Ct. 2616 (1977) . . . . .	32, 33
<u>United States v. Washington</u> , 459 F.Supp. 1038 (1978) . . . . .	15, 25
<u>United States v. Washington</u> , 693 F.2d 188 (9th Cir. 1982) . . . . .	10

Page

United States  
v. Winans, 198  
U.S. 371, 49 L.Ed.  
1089, 25 S.Ct.  
662 (1905) . . . . . 22, 30

Washington v.  
Washington Com-  
mercial Passenger  
Fishing Vessel  
Ass'n, 443 U.S.  
658, 61 L.Ed.2d  
823, 99 S.Ct.  
3055 (1979) . . . . . 2, 14, 19,  
21, 33, 34,  
35, 36, 38

Page

Treaties

**Treaty of Olympia,**  
12 Stat. 971 . . . . . 11, 34

Statutes

Federal

**18 USC 1165** . . . . . 24

**28 USC 1254** . . . . . 11

**28 USC 1331** . . . . . 22

**28 USC 1343** . . . . . 22

**28 USC 1345** . . . . . 22

**28 USC 1362** . . . . . 22

Washington State

**RCW 77.16.060** . . . . . 17

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals, United States v. Washington is reported at 693 F.2d 188 (9th Cir. 1982) and appears in the appendix hereto (Appendix A). The Order Modifying and Approving Magistrate's Proposed Findings and Conclusions Re Allocation of Quinault River Steelhead entered by the United States District Court for the Western District of Washington on May 8, 1981 (Civil #9213-Phase I) is unreported (Appendix C). The District Court's Order denied reconsideration June 27, 1981, (Appendix D). The Report entered by the United States Magistrate on April 7, 1981 (Appendix B), was approved by the

District Court order of May 8, 1981.

JURISDICTION

The opinion of the Ninth Circuit Court of Appeals entered on December 7, 1982, affirmed the District Court's order and the United States Magistrate's report and recommendation. This petition is filed within 90 days of that date. The jurisdiction of this court is invoked under 28 USC 1254.

TREATIES INVOLVED

This case involves fishing rights under the Treaty with the Quinaults (Treaty of Olympia), 12 Stat. 971. The relevant Article, Article III, reads as follows:

The right of taking fish at all usual and accustomed grounds and stations is secured

to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and keep up and confine the stallions themselves.

#### STATEMENT OF THE CASE

The opinion here sought to be reviewed, affirmed orders issued by the United States District Court for the Western District of Washington in its continuing jurisdiction in United States v. Washington, (W.D. Wash, Civil No. 9213-Phase I). The continuing

jurisdiction involves Indian treaty fishing in the State of Washington.

The orders by the District Court denied a state motion which sought to terminate an Indian fishery on steelhead trout in the Quinault River. The basis for seeking the injunction was that the Quinault treaty Indian net fisheries on steelhead trout in the Quinault River had taken more than 50% of those fish and were continuing to fish despite repeated requests to terminate fishing.

The court also denied a Washington motion for reconsideration and request for determination that non-Indian fishermen are entitled to at least a 50% share of the Quinault River steelhead trout.

The treaty fishing rights issue and these parties have been before this Court in Washington v. Washington Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658, 61 L.Ed.2d 823, 99 S.Ct. 3055 (1979). After that decision the state took the position that the law was clear: requiring either treaty Indian or non-Indian fisheries to be closed to protect each other's share of the fishery. A maximum share of 50% was allocated to treaty Indians.

The State of Washington acted in good faith to implement the decision by closing nontreaty fisheries where necessary to comply, notice is given to the tribes if there is need for a fishing closure.

If a dispute arises as to the need for a closure, such disputes may be presented first to a "Fisheries Advisory Board" established by order of the court (United States v. Washington, 459 F.Supp. 1038, 1061 (1978)) and composed of representatives of the State and Indian tribes.

Some facts about the river and the fishery are necessary to understand this case.

The Quinault River arises in the Olympic mountains of Western Washington. It flows southwesterly and enters Lake Quinault and the boundaries of the Quinault Reservation.<sup>3</sup> Below Lake

---

<sup>3</sup> As noted, infra, p. 18, most of the lands bordering the Lake are off-reservation.

Quinault, it re-forms into the Quinault River flowing southwest until it enters the Pacific Ocean.

There are runs of several salmon species (genus *Onchorhynchus*) present in the Quinault River. However, this case is concerned with steelhead, an anadromous rainbow trout (*salmo garidnerii garidnerii*). Like salmon, these trout migrate while young to the ocean where they spend several years maturing. There are several differences between salmon and steelhead.

Steelhead are not caught in saltwater (as are some salmon). Another difference between trout and salmon is that trout do not naturally die after spawning in freshwater.

When the Quinault steelhead return to the Quinault River, they are subject to treaty Indian net fisheries in the lower stretches of that river.

Nontreaty fisheries for steelhead trout are restricted by Washington State law to hook and line angling (RCW 77.16.060). They occur throughout the Quinault system, including the lower river, Lake Quinault and the portion of the river above the lake. (In the lower river, many of the fishermen are guided for a charge by Quinault tribal members.)

Though steelhead trout naturally spawn in most of the Quinault River, a large proportion of the catch is produced by a federal (or federally funded) hatchery within the Quinault Reservation.

Also important to this case is the ownership of the land bordering the Quinault River or Lake Quinault. Approximately 30% of all reservation land is non-Indian. The Tribe furnished the Circuit Court figures showing only 27.7% of the lands bordering Lake Quinault are on the reservation. Of this, less than half is tribally held (or in trust for Quinaulds). Thus, a maximum 13% of the lake front is in trust. Of the downstream Quinault River 85.5% is tribally owned (or in trust for Quinaulds) and 11.5% non-Indian. Of the tributaries, the relevant figure is 32% of the waterfront in non-Indian ownership.

In the first season after this

Court's decision in Washington v. Washington Commercial Passenger Fishing Vessel Ass'n, supra, the Quinault Tribe exceeded the treaty Indian 50% share of steelhead catch on the Quinault River by the end of January (1980). The Washington Department of Game took the matter to the Fisheries Advisory Board, trying to persuade the Tribe to stop fishing. After Washington filed a motion for injunction, the Tribe voluntarily closed its fishery.

The next steelhead season (1980-81) proceeded in a similar fashion. By January 8, 1981, the treaty Indian commercial catch had exceeded 50% of the total harvestable steelhead. The State Department of Game adopted a regulation

to close the commercial fisheries on the Quinault and several other rivers. The Quinault Tribe continued its refusal to go along with this closure. To enforce the Quinault closure, a motion for temporary restraining order / preliminary injunction was filed by Washington on January 10, 1981, with supporting affidavit, etc., and a notice of hearing.

Unlike the previous season, the Tribe did not act to close its fishery. An order of the district court referred the matter to a United States magistrate on January 9, 1981. After a hearing, the magistrate entered a report and recommendation for denial of the injunction on April 7, 1981, (after the treaty Indian fishery had taken most of

the run).

The magistrate reasoned that the Tribe was not limited to the 50% maximum established by this Court (Washington v. Washington Commercial Passenger Fishing Vessel Ass'n, supra) but rather had an exclusive right to 100% of "reservation" fish plus 50% of those which would pass upstream from the reservation. This conclusion was subsequently adopted by the district court. A motion for reconsideration / request for determination was denied. The appeal to the Ninth Circuit followed.

The Ninth Circuit affirmed the district court's orders, "under the compulsion of Consolidated Salish and Kootenai Tribes v. Naman, 665 F.2d 951

(9th Cir 1982), cert denied \_\_\_\_ U.S. \_\_\_\_ (Nov. 1, 1982)." United States v. Washington, 693 F.2d 188, at 189 (App. A).

#### FEDERAL COURT JURISDICTION

The district court exercises continuing jurisdiction. Jurisdiction was originally based upon one or more of the following statutes: 28 USC 1345, 1331, 1343 and 1362.

#### REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit Court of Appeals conflicts with decisions of this Court in two ways. First, the decision conflicts with this Court's rulings that tribes do not have authority over non-Indian hunting and fishing, at least if it does not occur on Indian

land. Secondly, the decision conflicts with this Court's decision that non-Indians are also entitled to a share of fish runs to which the Treaty of Olympia applies.

1. The decision below conflicts with decisions of this Court limiting the authority of Indian tribes over non-Indians.

Decisions of this Court compel the conclusion that Indian tribes do not have jurisdiction to control non-Indian fishing and hunting activities, at least unless those activities occur on tribal lands. Montana v. United States, 450 U.S. 544, 67 L.Ed.2d 209, 101 S.Ct. 1245 (1981). Indeed, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 55 L.Ed.2d

209, 98 S.Ct. 1011 (1978), would seem to mandate that this conclusion--that tribes do not have jurisdiction over non-Indian hunting and fishing--may be without qualification as to ownership of the land. (There is, of course a federal statute prohibiting going on Indian lands for hunting and fishing without Indian permission. 18 USC 1165, discussed in Montana, supra, 561.)

The Circuit Court decision made no attempt to analyze these decisions, concluding that a tribe "owns" rivers within its reservation boundaries.

The court then implied that this "ownership" provides a tribe authority to exclude others (nonmembers) from all use of a navigable waterway, including

fishing. The Court cited as sole authority the Ninth Circuit decision in Consolidated Salish v. Namen, 665 F.2d 951 (9th Cir. 1982), cert. denied, \_\_\_ U.S. \_\_\_ (Nov. 1, 1982).

The court below concluded that Indians own the bed and waters of all on-reservation waters, including those navigable, and thus own those resources such as fish found in those waters.

This reluctant conclusion led the circuit court to suggest this Court's review: "the possibility of conflict suggested by Justice Rehnquist warrants consideration of the issue by the Supreme Court." United States v. Washington, supra, at 190 (App. A).

Factually, this "ownership" analysis

is tenuous when applied to the steelhead trout in this case. These fish return to the river only after spending years in the ocean. Further some of these fish which originate within the reservation will, if not netted, migrate further upriver, beyond the reservation. Few have that opportunity, of course, being killed by the intensive lower river net fishery. This is also true of those which originate in the upper watershed.

The district court and the concurring circuit opinion are both willing to concede to non-Indian fishermen a share of the fish originating and returning to off-reservation upriver areas. Neither, however, suggests how such fish may be protected from the net

fishery when they enter mixed with fish to which they hold the Tribe has exclusive right. The rights the courts below concede are thus without remedy to protect them.

The "ownership" analysis, as previously applied in determining state interests in wildlife has been specifically overruled by this Court.

Douglas v. Seacoast Products, 431 U.S. 295, 52 L.Ed.2d 304, 97 S.Ct. 1740 (1977):

Neither the State nor the Federal Government, any more than a hopeful fisherman or hunter have title to these creatures until they are reduced to possession by skillful capture.

If this is true of the states (and the United States), it is also true of a

tribe. This Court has recognized that states have an interest not as owner, but as trustee for the public who participate in the use and enjoyment of the fish and wildlife. Though overruling the "ownership" fiction, the court has recognized the continued importance to a state's people of the state's power to preserve and regulate exploitation of a natural resource. Douglas, supra, at 284.

In this the state is a trustee for the beneficiaries; those who utilize and enjoy those resources. While a tribe may have an analogous trust interest in the fish resource while within its reservation, the regulatory authority extends only to the Tribe's members. The

trust responsibility should surely extend to protecting nonmember citizens' rights to the minimum 50% share to which this Court has held they are entitled. This will be more fully discussed infra, p. 32, et. seq.

It is ironic that the decision of the lower courts in this action are apparently predicated upon the authority of the tribe to totally exclude nonmember from sharing in the fish resource, but the tribe has not attempted to do so. Such fishing continues and tribal members benefit directly by serving as guides for substantial fees.

As in Montana v. United States, supra, an attempt to stop nonmembers' fishing would undoubtedly prompt vigorous

dissent from the nonmembers including the public who own the majority of the lake front, much of the river front, and the navigable river and navigable lake itself.

Even where the waterfront is held in trust for the Tribe, United States v. Winans, 198 U.S. 371, 49 L.Ed. 1089, 25 S.Ct. 662 (1905), suggests it is questionable whether such ownership could be used to exclude non-Indian fishermen from fish to which this Court has held them entitled by treaty. (See discussion, infra, p. 32.)

It is worthy of note also that the Quinault Reservation has never been an "exclusive" reservation for the Quinault Tribe such as was once true of some

Indian reservations. This Court set forth the history of the Quinault Reservation in some detail in Halbert v. United States, 283 U.S. 753, 75 L.Ed. 1389 (1931). Indians other than Quinaults were, and are owners of the reservation lands. If nonmembers, these Indians presumably could also be victim of any determination the Quinault tribal rights are exclusive.

As previously noted, there is substantial non-Indian ownership of waterfront. Once nonmembers are assured of obtaining access to these navigable waters, the questions are two. First, can they fish? Second, is the fishery to be meaningful, i.e., will any fish be available?

The affirmative answers to both of those questions are found in a previous decision of this Court which the court(s) below disregarded.

2. The decision that the Tribe may catch all the reservation fish run conflicts with this Court's decisions interpreting the treaty fishing article.

This court, in Puyallup Tribe v. Department of Game (Puyallup I), 391 U.S. 392, 20 L.Ed.2d 689, 88 S.Ct. 1725 (1968), and Puyallup Tribe v. Washington Game Department (Puyallup III,) 433 U.S. 165, 53 L.Ed.2d 667, 97 S.Ct. 2616 (1977), held that the rights of the treaty Indians and all citizen fishermen should both be protected are entitled to a fair share and that neither could act

to preempt the other. The existence of a reservation was not legally relevant to that holding. ("The continued existence of the Puyallup Reservation has been a matter of dispute on which we express no opinion." Puyallup III, supra, at fn. 11, p. 174.)

Finally (Washington hoped) this Court in Washington v. Washington Commercial Passenger Vessel Ass'n, supra, specified the limits to apply in determining the share of each. The Indians' entitlement is a maximum of 50% of any run. Other fishermen are entitled to catch the other 50% and to have that opportunity protected:

Counting the reservation catch then, the treaty Indian catch is subject to a maximum of 50%

...

It bears repeating, however,  
that the 50% figure imposes a  
maximum but not a minimum ...  
the maximum possible allocation  
to the Indians is fixed at 50%,  
the minimum is not; ...

Washington v. Washington Commercial  
Passenger Fishing Vessel Ass'n., supra,  
at 686, emphasis supplied.

In reaching this conclusion, the court considered the Quinault Treaty (Treaty of Olympia, 12 Stat. 971) and determined that it secured to both sides a right to take a fair share of the available fish. The prior Puyallup decisions were discussed in light of the Indians' argument that they had an exclusive right to the on-reservation fish. This is particularly important

because this Court had considered the existence or non-existence of a reservation irrelevant in prior decisions to protect the fish and fishing rights of treaty Indians and those of other citizens.

The conclusion mandated by these decisions is that an exclusive right to the fish does not exist, irregardless of the existence of a reservation.

This determination is res judicata and binding on the Quinault Tribe. The Tribe was involved in both cases. The Tribe was a party in Washington v. Washington Commercial Passenger Fishing Vessel Ass'n.. They were also represented, through the United States Government which argued on behalf of all

tribes (in that case, as it did in this case). The Quinaults were also one of the amici curiae and represented by the United States in its trust capacity in the Puyallup decisions.

The Quinaults joined in the brief of respondent tribes, in Washington v. Washington Commercial Passenger Fishing Vessel Ass'n, supra, assured this Court that the on-reservation catch was factually not a problem since the sharing was negotiated and agreement reached with the state:

[T]o prevent any of the type of on-reservation preemption about which this court expressed concern in the Puyallup litigation fn 296

fn 296

In addition, the district court specifically ruled that

neither the State nor the tribes may authorize fishing which would preempt the opportunity of the other.

Tribal Brief, p. 105.

Additionally, the Quinault Tribe, in its separate brief, acknowledged the on-reservation application of the sharing of fish. The Quinault brief showed the steelhead run as precisely equally divided between "river net" and steelhead sports. (Quinault Appendix, D-1).

The necessary conclusion is that the Quinault Tribe, acting on its own behalf, (joining one brief, filing one separately) and represented by its trustee the United States had full opportunity to raise, or chose not to raise, all arguments for excluding

Quinault steelhead caught on-reservation. They are bound by the judgments in both Puyallup and Washington v. Washington Commercial Passenger Fishing Vessel Ass'n.

This Court's judgment is clear: On-reservation catch is all to be counted; there must be no preemption of the non-Indian fishery, even where an exclusive right of access could be argued (on the Quinault as in Puyallup such is not the case, see supra, p. 29-31):

Both sides have a right, secured by treaty, to take a fair share of the available fish. That, we think, is what the parties to the treaties intended when they secured to the Indians the right of taking fish in common with other citizens.

Washington v. Washington Commercial

Passenger Fishing Vessel Ass'n, supra, at  
684.

As noted above, the "fair share" was determined by this Court to be (at least) 50% for the nontreaty fisheries. That right, secured by treaty, must be as enforceable as the right of the treaty Indians. Washington asks the assistance of this Court in rendering it so.

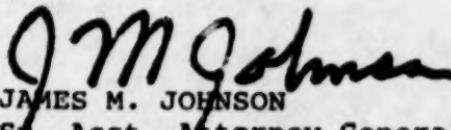
**CONCLUSION**

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

DATED this 4<sup>th</sup> day of March, 1983.

Respectfully submitted:

KENNETH O. EIKENBERRY  
Attorney General

  
JAMES M. JOHNSON  
Sr. Asst. Attorney General

UNITED STATES of America,  
et al., Appellees,

v.

STATE OF WASHINGTON,  
et al., Appellants.

No. 81-3502

United States Court of Appeals  
Ninth Circuit

Argued and Submitted July 8, 19  
82

Decided Dec. 7, 1982

Appeal was taken from  
judgment of the United States  
District Court for the Western  
District of Washington, Walter  
Early Craig, J., in an action  
involving dispute over Indian  
fishing rights. The Court of  
Appeals, Kilkenny, J., held

that Indians who were party to  
treaty owned lake bed under  
that part of a lake which was  
specifically included in and  
formed a boundary of the  
reservation, where the Indians  
were dependent upon fishing  
when the treaty was signed.

Affirmed.

Canby, Circuit Judge,  
filed a concurring opinion.

Indians

Indians who were party to  
a treaty owned the lake bed  
under that part of a lake which

was specifically included in  
and formed a boundary of the  
reservation, where the Indians  
were dependent upon fishing  
when the treaty was signed.

---

Appeal from the United  
States District Court, Western  
District of Washington.

Before WRIGHT, KILKENNY  
and CANBY, Circuit Judges.

KILKENNY, Circuit Judge

This action came before  
the district court pursuant to

its continuing jurisdiction over certain disputes involving Western Washington Indian Tribes and the State of Washington. See, United States v. Washington, 384 F.Supp. 312, 419 (W.D. Wash. 1974), aff'd 520 F.2d 676 (CA 9 1975), cert. denied, 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976). This particular controversy arose on January 8, 1981, when the State of Washington asked the district court to issue either a temporary restraining order or preliminary injunction to prevent the Quinault Indian

Nation from taking any further steelhead trout from the 1980-81 Quinault River Steelhead Run. The district court denied the request. In addition, the district court determined the respective rights of the parties to the Quinault River Steelhead Run. This appeal followed.

Under the compulsion of  
Consolidated Salish & Kootenai  
Tribes, etc. v. Namens, 665 F.2d  
951 (CA9 1982), cert. denied,  
\_\_\_\_ U.S. \_\_\_, 103 S.Ct. 314, 74  
L.Ed.2d \_\_\_\_ (1982) (Justices  
Rehnquist and White

dissenting), we affirm the decision of the district court.

Confederated Salish held that Indians party to a treaty owned the lake bed under that part of a lake specifically included in and forming a boundary of the reservation, when the Indians were dependent on fishing when the treaty was signed. This case presents the same situation.

Justice Rehnquist has suggested that Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493

(1981), requires that a treaty specifically grant rights in land under navigable water, or that land will be treated as held by the United States for the benefit of the future state. Confederated Salish, \_\_\_ U.S. \_\_\_, at \_\_\_, 103 S.Ct. 314 at 315 (1982). (Rehnquist, J., dissenting), denying cert. to 665 F.2d 951 (CA9 1982). He expressed "substantial doubt as to whether the Court of Appeals reached the right conclusion" on the land ownership issue in Confederated Salish. Id. at \_\_\_, 103 S.Ct. at 315.

There are factual differences between Montana and Confederated Salish. However, as Justice Rehnquist points out, the exact limits of the Montana holding are not clear. Given the importance of certainty where issues of ownership of land are involved, the possibility of conflict suggested by Justice Rehnquist warrants consideration of the issue by the Supreme Court.

AFFIRMED.

CANBY, Circuit Judge,

concurring:

I concur in Judge Kilkenny's opinion, except that I do not share the expressed doubt as to the proper limits of the Montana and Confederated Salish holdings. In my view the two decisions are distinguishable for reasons stated in Confederated Salish, 665 F.2d at 961-62, and, as the majority here concludes, the present case falls squarely within the rule of Confederated Salish.

I also wish to add a few

words of explanation about the controversy before us. The dispute in this case arises from the fact that a large portion of the steelhead run in the Quinault River never proceeds far enough upstream to leave the boundaries of the Quinault Indian Reservation, which encompass the River from its mouth into Lake Quinault, 21 miles inland. A minor part of the run, however, migrates upstream beyond Lake Quinault and the Reservation. The district court ruled that non-treaty fishermen (i.e., the general public) were entitled

only to 50% of the harvestable run of those steelhead that would, if not intercepted, pass upstream beyond the boundaries of the Reservation. The State contends that the district court should have allocated to non-treaty fishermen 50% of the harvestable portion of the entire run, including those fish that never pass beyond the boundaries of the Reservation. Our decision affirms the order of the district court.

It is already established in this case that the tribe retains exclusive fishing

rights within the boundaries of its Reservation. United States v. Washington, 384 F.Supp. 312, 332 and n. 12 (W.D. Wash. 1974) ("Final Decision I"), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976). It is true that the tribe may not rely on that exclusive right in order to take more than its equal share of fish passing through the reservation. Washington v. Washington State Commercial Passenger Fishing Vessel Assn'n, 443 U.S. 658, 683-84, 99 S.Ct. 3055, 3073-3074, 61

L.Ed.2d 823 (1979). On the other hand, it is inherent in the tribe's exclusive control of its reservation that non-treaty fishermen would be entitled to no part of the run if none of the fish ever passed beyond the reservation (or, indeed, if the river did not). If some few fish pass beyond the reservation, then the non-treaty fishermen are certainly entitled to harvest their share of those fish. The passage of those few fish, however, does not entitle non-treaty fishermen to half of all of the harvestable fish in

the river. Nor does the principle change if more than a few passed; the non-treaty share must still be derived from that run of fish to which non-treaty fishermen are entitled to access. The district court's formula is therefore a proper one.

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF )  
AMERICA, et al., )  
Plaintiffs, ) Civil No. 9213 -  
v. ) Phase I  
STATE OF WASHINGTON, ) REPORT AND  
et al., ) RECOMMENDATION  
Defendants. ) ON MOTION FOR  
 ) TEMPORARY RE-  
 ) STRAINING ORDER  
 ) OR PRELIMINARY  
 ) INJUNCTION  
 )

---

SUMMARY

The Court has referred, for report and recommendation, a motion by the State of Washington for a temporary restraining order or preliminary injunction. The stakes involved are the competing interests of treaty and non-treaty fishermen in steelhead trout which enter

the Quinault River from the Pacific Ocean. For reasons discussed below, I recommend the Court conclude that non-treaty fishermen are entitled to a much smaller share of the steelhead than the State of Washington claims on their behalf. The State's motion for injunctive relief should therefore be denied, and the problem of allocation remanded to the Fisheries Advisory Board with specific directions.

PROCEDURAL BACKGROUND OF MOTION

This is the second such motion presented by the State. About one year ago, it filed a Motion for a Temporary Restraining Order or Preliminary Injunction, seeking to limit fishing by the Quinault Nation ("Tribe") and its

members in the Quinault River. The United States, on behalf of the Tribe, filed a memorandum in opposition. Apparently the State never pursued the motion, and there was never a ruling on it.

The State filed this motion on or about January 8, 1981, relating to the 1981 Quinault steelhead run. This was referred for hearing to United States Magistrate Robert E. Cooper, but later transferred to the undersigned by order filed January 16, 1981. Counsel for all parties and intervenors filed memoranda and affidavits, and participated in a hearing on January 21, 1981.<sup>1</sup> By

---

<sup>1</sup> A transcript of that hearing has been filed as docket #7436.

agreement, that hearing was limited to oral argument; no evidence was presented, beyond that contained in the affidavits.

At the conclusion of the hearing, counsel were advised of the substance of this Report and Recommendation, and that they would receive copies and be afforded an opportunity to respond to it before final ruling by the Court. 28 U.S.C. §636(b)(1).

#### FACTUAL SETTING

Although there has been no evidentiary hearing on the motion, certain facts are set forth in the affidavits. Others, stated by counsel in their memoranda or in oral argument, are essentially undisputed. There appears to

be no genuine dispute as to the basic facts relating to the motion. The real dispute turns upon the proper application of the case law to this factual setting.

1. Geography. The Quinault Reservation comprises about 190,000 acres or almost 300 sq. miles. It is shaped roughly in the form of triangle, with one edge consisting of about 24 miles of Pacific coastline. The reservation tapers to Lake Quinault about 21 miles inland, which is contained within the reservation and represents its easternmost portion. The mouth of the Quinault River is on the reservation, as is the entire portion of the river between the Pacific Coast and Lake Quinault. The river originates upstream

of Lake Quinault, however, in lands entirely outside of the reservation.

2. Steelhead Run. Returning steelhead enter the mouth of the Quinault and head upstream every year, between about mid-November and the end of April. Like salmon, steelhead generally return to their spawning grounds. They are not quite as dependable as salmon in this respect, however, and there is somewhat more "straying." Two hatcheries and a penned rearing facility on the reservation release a substantial number of steelhead. There are also wild steelhead, some which originate in and below Lake Quinault (i.e. on the reservation), and others above the lake (off the reservation).

As a result, if no returning steelhead at all were taken from any portion of the Quinault River system, some would never leave the reservation, where their spawning grounds are located. These steelhead will be designated "reservation fish."<sup>2</sup> Others, however, would migrate up the river, through Lake Quinault, and then further upstream to areas off the reservation. These steelhead will be designated "through fish."

The Tribe and the United States estimate that, in 1980-1981, 85% of the fish entering the Quinault River are "reservation fish." While the State

---

2 In their briefs and argument, counsel referred to these steelhead as "destination fish."

disputes the precise accuracy of this number, there seems to be little dispute that, even if there were no fishing, only a small minority of the steelhead entering the Quinault River would ever pass through Lake Quinault and leave the reservation. The parties advise that the Fisheries Advisory Board can, if directed, make a reliable determination for a given year of the proportions of "reservation" and "through" fish.

3. Fishing. Based upon run predictions and various biological factors, a total harvestable number of steelhead can be set each year for the entire Quinault River run. The 1980-1981, that number will be approximately 15,000 fish. The parties

agree that, for conservation reasons, the total harvest must in no event exceed that amount and, if possible, should not be substantially less.

The Tribe and its members have the exclusive right to take steelhead on the reservation, subject to two minor exceptions discussed below. They do so, pursuant to Tribal fishing regulations, by net fishing, which is relatively efficient. Non-treaty fishermen take steelhead by "sport fishing" techniques - i.e., by hook and line. Even in a good year, this technique is not particularly "efficient," compared to net fishing. This year, weather conditions have caused so much turbidity of the river that the fish cannot see the lures. The harvest

by sport fishermen is therefore of de  
minimus proportions.

While non-treaty fishermen on the Quinault River do most of their steelhead fishing above Lake Quinault, off the reservation, some hire Indian guides, and are therefore permitted to fish on the reservation. Others own fee patent land on the river within the reservation, and fish there for steelhead.

As of January 19, 1981, the Quinault Tribal catch on the Quinault River from November 1, 1980 was 9,462 steelhead.<sup>3</sup> This represents approximately 63% of the projected maximum 1980-1981 harvest for all fishermen for all portions of the

---

<sup>3</sup> Affidavit of Peter K. J. Hahn,  
January 19, 1981.

river.

#### CONTENTIONS OF THE PARTIES

Reduced to simplest terms, the contentions of the parties are as follows.

The State asserts that treaty and non-treaty fishermen are each entitled to half of the harvestable steelhead that enter the Quinault River system, regardless where the fish are destined or are taken.

The United States, together with the Tribe and other intervenor tribes, claim that treaty fishermen are entitled to the sum of: (a) 100% of the harvestable steelhead that are "reservation fish;" and (b) 50% of the harvestable steelhead that are "through fish." They contend

that the non-treaty fishermen are entitled only to the other 50% of the "through fish."

While the issue is now essentially moot for the 1980-1981 steelhead run, all parties agree that the legal issue of the share to which each group is entitled is an important one for allocations of runs in future years.

LEGAL PRINCIPLES ESTABLISHED  
IN PRIOR CASES

From the welter of decisions on the fishing rights of the treaty Indians in the State of Washington, several relevant basic principles emerge.

1. Apportionment. The Stevens Treaties require apportionment, between treaty Indians and non-treaty fishermen,

of the harvestable portion of each run that passes through a "usual and accustomed" fishing ground for treaty Indians. Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 685 (1979) ("Passenger Fishing Vessel").

2. Size of Shares. As to those runs that are subject to allocation at all, the maximum share of the treaty Indians is 50% of the harvestable portion of the run which passes through its customary fishing grounds. The treaty Indians are entitled only to a smaller portion, if such a portion is sufficient to provide the treaty Indians a moderate living. Passenger Fishing Vessel, 443 U.S. at 686-687. The burden is on the

State to show that some share less than 50% would be sufficient to provide the Indians a moderate living. "Opinion" of Hon. William H. Orrick filed in this case, 9-26-80, docket no. 7240, at page 31.

3. No Share If No Access. The allocation rules apply only to those runs of fish which, in the course of their migration, are subject to harvest both by treaty and non-treaty fishermen. In other words, treaty fishermen have no right to any portion of a run which at no point enters or passes through a usual and accustomed fishing ground.

4. Fish Counting Rules. Once a fish run has been identified as subject to allocation between treaty and

non-treaty fishermen, the courts have developed a number of rules governing how fish catches are counted and applied against those allocations. Those rules include the following:

(a) On a run that passes through a reservation, then goes upstream to an area where nontreaty fishermen have access, fish caught by treaty fishermen on the reservation count toward the overall share of treaty fishermen.

Passenger Fishing Vessel, 443 U.S. at 687.

(b) Hatchery-bred fish are to be treated in the same manner as "natural" or "wild" fish, for purposes of allocations and counting against shares. See "Judgment" entered by the Hon. William H. Orrick in Phase II of this case, filed on January 8, 1981, docket no. 7374, together with Judge Orrick's "Opinion" filed September 26, 1980, docket no. 7240).

### 5. Interference With Upstream

Catch. Where a fish run passes through an area in which either treaty or non-treaty fishermen have exclusive access, that group cannot take so many fish as to impair the rights of upstream fishermen to take their fair share.

Puyallup Tribe v. Washington Department of Game, 433 U.S. 165 (1977) ("Puyallup III"); and U.S. v. Winans, 198 U.S. 371.

### 6. Proper Harvest to Be Assured.

Allocations of fish should never be done in a manner which would result either in over-harvest or under-harvest. If a group of fishermen - be it the treaty fishermen or non-treaty fishermen - is not in a position to catch all of the

fish to which it would otherwise be entitled, the remainder should be re-allocated to the other group.

APPLICATION TO THIS CASE

If all of the steelhead which enter the mouth of the Quinault River swam upstream only to points within the reservation (i.e., all were "reservation fish"), this case would pose no problem. The treaty Indians would be entitled to all of the harvestable steelhead.

Likewise, if all of the steelhead swam through the reservation and into the portion of the Quinault River above Lake Quinault (i.e., all were "through fish"), there would likewise be little problem. The case would therefore be identical in most respects to Puyallup III. The

treaty and non-treaty fishermen would each be entitled to 50% of the harvestable run. Fish caught by the Indians on the reservation would count toward their allocation, by virtue of Passenger Fishing Vessel. Hatchery fish would likewise count, by virtue of Judge Orrick's decision. If non-treaty fishermen were able to show that the treaty Indians had taken, or were threatening to take on the reservation, more than their 50% share of the entire run, the non-treaty fishermen would be entitled to relief from this Court, as they were in Puyallup III.

Passenger Fishing Vessel and Puyallup III both involved "through fish." In this case, by contrast, only

one-seventh of the steelhead are "through fish." The other six-sevenths are "reservation fish", which never reach a joint use area.

Allocating 50% of all of the steelhead entering the Quinault River respectively to treaty and non-treaty fishermen would work manifestly unfair results. The vast majority of the fish are "reservation fish." Why should the fact that a few of them would swim beyond the reservation and therefore become accessible to non-treaty fishermen, entitle non-treaty fishermen to 50% of the entire number of fish entering the Quinault River? Indeed, even if allocated a 50% share, non-treaty fishermen could not begin to harvest

these fish. Even if they were the only fishermen in the stream above Lake Quinault (and they are not), and even if they could catch every steelhead which swam above Lake Quinault (and they have difficulty catching any this year), the most they could take would be one-seventh of total number of fish entering the Quinault River. Furthermore, this does not allow for escapement of any of the fish that swim above Lake Quinault. The allocation of 50% of all of the steelhead to the non-treaty fishermen therefore could not possibly be justified.

By the same token, however, the treaty fishermen cannot be permitted to harvest steelhead at will, and without limitation, on the reservation. The

portion of the river above Lake Quinault is a joint use area. Although the number of steelhead which would reach that area is relatively small, nevertheless the non-treaty fishermen are entitled to at least their share of the harvestable portion of those fish. The United States conceded as much in its memoranda before this court. If the treaty fishermen are permitted to harvest as many fish as they see fit on the reservation, a possible result is that no harvestable fish would be available to the non-treaty fishermen above the lake.

It is therefore my recommendation that the court regard the steelhead which enter the Quinault River as comprising two separate runs: those which have been

designated "reservation fish" herein, and those which have been designated "through fish." The court should find that treaty fishermen are entitled to take the entire harvestable number of "reservation fish." The two groups are each entitled to 50%, however, of the "through fish."

Steelhead taken by treaty fishermen would count toward their allocation, whether taken within or outside the reservation. Passenger Fishing Vessel. Hatchery bred fish would count toward their allocation in the same manner as other fish. ("Judgment" of Judge Orrick).

Likewise, steelhead caught by non-treaty fishermen would count toward their allocation, whether taken above

Lake Quinault or within the reservation (e.g., as part of the Indian guide fishery, or by owners of land within the reservation).

Counsel advised that, when a fish is taken on the reservation, it is not possible to identify whether it is a "reservation fish" or a "through fish." This will not be necessary, however, in giving effect to the foregoing allocation. As discussed above, it apparently is possible to predict the total number of steelhead which will enter the Quinault River in a given year, the proportions of those fish which are "reservation fish" and "through fish," and the appropriate level for harvest. Using the legal conclusions recommended

above, the Fisheries Advisory Board can then use this data to determine the share for each group for a given year. Steelhead can then be credited against those shares, wherever harvested.

It is respectfully submitted that the foregoing procedure would be fair to both groups, and fully consistent with prior court determinations in this area.

In addition, the foregoing would parallel one which has already been made for the Lower Columbia River. The United States and the Tribe assert that the Lower Columbia presents a highly analogous situation, with the positions of the parties reversed. They assert that non-treaty fishermen have exclusive fishing access to the Lower Columbia

River. There are adjudicated treaty fishery rights, however, on the Columbia above Bonneville Dam. Some, but not all, of the fish available in the Lower Columbia River are destined for the area above Bonneville Dam. According to these parties, the State has contended, and the federal courts have agreed, that the non-treaty fishermen are entitled to harvest all of those fish in the Lower Columbia which are not destined to travel above Bonneville Dam. The treaty fishermen are entitled, however, to a 50% share of those fish headed to or through the joint use areas. Thus, they contend, the courts have already applied a "combined run" principle in another situation where fish enter an exclusive

access area, and only some of the fish continue to a joint use area.

If the court accepts the conclusions recommended above, the motion for injunctive relief must be denied. The State has shown that the treaty fishermen have taken more than 50% of all the harvestable steelhead. But it has not shown that the treaty fishermen have taken so many as to impinge upon the proper share of the non-treaty fishermen: 50% of the "through fish." The State has also failed to show that the non-treaty fishermen would be in a position to take appreciably more steelhead if the Indian fishery were enjoined. The court's strong policy of assuring a full harvest would require such a showing before

injunctive relief could be granted.

CONCLUSION

For the foregoing reasons, I recommend the court make the following determinations:

(1) The Motion For a Temporary Restraining Order or Preliminary Injunction should be DENIED.

(2) Of the steelhead trout which enter the Quinault River in any given year, non-treaty fishermen are entitled to a 50% share of the harvestable portion of those fish which can be expected to migrate above Lake Quinault. Treaty fishermen are entitled to the

balance of the harvestable portion of steelhead which enter the Quinault River.

(3) All steelhead taken by fishermen should count toward their allocation, whether taken on or off the reservation.

(4) Hatchery bred fish should be treated in the same manner as natural or wild fish.

(5) The Fisheries Advisory Board, applying the foregoing principles and utilizing information as to run sizes and distribution, and other available data, should endeavor to determine the respective shares for treaty and

non-treaty fishermen of  
steelhead trout entering the  
Quinault River.

DATED this 7 day of April,  
1981.

/s/

John L. Weinberg  
United States Magistrate

**JOHN C. MERKEL**  
**United States Attorney**  
**GEORGE D. DYSART**  
**Special Assistant U.S. Attorney**  
**P.O. Box 150**  
**Portland, OR 97207**  
**(503) 221-3660**

**Attorneys for the United States**

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA**

UNITED STATES OF	)
AMERICA, et al.,	)
	)
Plaintiffs,	) CIVIL NO. 9213--
	) Phase I
v.	)
STATE OF WASHINGTON,	) ORDER MODIFYING
et al.,	) AND APPROVING
	) MAGISTRATE'S
Defendant .	) PROPOSED FINDINGS
	) AND CONCLUSIONS
	) RE ALLOCATION OF
	) QUINAULT RIVER
	) STEELHEAD
	)

---

**The Court, having reviewed the**

Report and Recommendations of the  
Magistrate in this matter issued April 7,  
1981, conducted a scheduled hearing on  
April 21, 1981, to consider any  
objections or views of the parties  
concerning said report, and having  
considered all such objections, views,  
and supporting arguments submitted by the  
parties at or prior to such hearing,  
together with the pleadings and the  
record before the Magistrate, now hereby  
makes the following de novo determination  
of the matter.

It is HEREBY ORDERED, ADJUDGED AND  
DECREEED as follows:

A. The Report and Recommendation of  
Magistrate John L. Weinberg dated April  
7, 1981, are hereby approved and adopted

with the modifications stated below.

B. The Magistrate's determinations of fact (designated as "Factual Setting") are modified by deleting the last sentence of the next to the last paragraph thereof (lines 8-10 of p. 5 of the Report).

C. The Conclusions recommended by the Magistrate are modified and hereby adopted as follows:

1. Defendant's Motion for a Temporary Restraining Order or Preliminary Injunction is DENIED.

2. Of the steelhead trout which enter the Quinault River in any given annual run, nontreaty fishermen are entitled to a 50% share of the harvestable portion of those fish which,

if not subjected to prior interception, would be expected to migrate above Lake Quinault. Treaty fishermen are entitled to the balance of the harvestable portion of steelhead which enter the Quinault River.

3. All steelhead taken by fishermen count toward their allocation, whether taken on or off the reservation.

4. Hatchery-bred fish shall be treated in the same manner as natural or wild fish.

5. The Fisheries Advisory Board, applying the foregoing principles and utilizing information as to run sizes and distribution, and other available data, should endeavor to determine escapement goals and the respective shares for

treaty and nontreaty fishermen of  
steelhead trout entering the Quinault  
River.

Dated this 8th day of May 1981.

/s/ Walter E. Craig  
Sr. United States  
District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF	)	
AMERICA, et al.,	)	
	)	
Plaintiff ,	)	CIVIL NO. 9213--
	)	Phase I
v.	)	
	)	ORDER
STATE OF WASHINGTON	)	
et al.	)	
	)	
Defendant .	)	
	)	

---

The State of Washington has filed a motion to reconsider the Court's order modifying and approving the magistrate's proposed findings and conclusions re allocation of Quinault River steelhead. The motion is denied for the reason that there is nothing in the motion that was not fully considered when the Court made

its original decision.

IT IS SO ORDERED.

DATED at Prescott, Arizona this 2nd  
day of June, 1981.

/s/ \_\_\_\_\_  
Walter E. Craig  
United States District Judge